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IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

ROY J. NEERING,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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PRELIMINARY STATEMENT

The petition for writ of certiorari supports the allegations of fact by references to those court opinions found in its appendix. The state likewise will support statements of fact made in this response by appropriate references to the same opinions relied on by petitioner. For purposes of saving print-

ing costs, such references will be to the appendix of petitioner's petition.

STATEMENT OF THE FACTS

The defendant-petitioner, after learning that a certain friend of his was a member of the venire from which the jury for a particular case would be chosen, called such friend and stated:

> "The reason I called you . . . is that I want you to do me a special favor. I have an attorney friend . . . who has a case coming up Tuesday. It's Brendel vs. Winn-Dixie. You are on the jury list and there are a lot of insurance people and other undesirables that we don't like. I can't tell you anything about the case, but would you be averse to giving the old gal a little something for her pain and suffering, for her broken hip and leg?" (See Appendix D, page 15a).

The petitioner alleges that he added the comment "If the facts warrant it . . .", to the above quote; however, such allegation was adverse to the testimony of the witness to whom the petitioner was speaking.

STATEMENT OF THE CASE

The state attorney, after receiving information of the above facts, prepared a direct information and submitted such to the court. After such charging instrument was presented to the trial judge, such judge issued an order for a rule to show cause, which was served upon petitioner on May 10, 1961, and made returnable on May 15, 1961. The criminal jurisdiction of the circuit court which suffered the contempt of the petitioner was limited to capital cases, and therefore the pleadings were filed and numbered as a case at law.

Petitioner was sentenced to one year by the trial court, but on appeal such sentence was found to be excessively harsh, and reduced to six months in an unprecedented action by the appellate court. (See appendix D, 14a through 18a).

The state, as well as the petitioner, took certiorari to the Florida Supreme Court, and writs of certiorari were granted to both parties. Such writs were later found to have been improvidently issued, and were therefore discharged. (Appendix A, page 1a of petitioner's petition for writ of certiorari filed in this court indicates that the denial of the writs of certiorari occurred in the case of Neering vs. State of Florida; such is highly misleading and inaccurate, as will be shown by a reference to the true case styling found at 155 So.2d 874, which is *Roy J. Neering*, petitioner, vs. *State of Florida*, respondent; *State of Florida*, cross-petitioner, vs. *Roy J. Neering*, cross-respondent; *State of Florida*, petitioner, vs. *Roy J. Neering*, respondent.)

Petitioner now seeks review through his petition for writ of certiorari to the United States Supreme Court.

QUESTIONS INVOLVED

The following questions will parallel the issues raised by their corresponding numbers in the petition for writ of certiorari.

QUESTION ONE

WHETHER A STATE VIOLATES DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE UNITED STATES CONSTITUTION BY FAILURE TO AFFORD A JURY TRIAL TO THOSE ACCUSED OF CONTEMPT OF COURT.

QUESTION TWO

WHETHER THE ACTION OF THE PETITIONER CONSTITUTED THE CRIME OF CONTEMPT.

QUESTION THREE

WHETHER A JUDGE IS DISQUALIFIED FROM PRESIDING OVER CONTEMPT PROCEEDINGS WHICH WERE DIRECTED AT HIMSELF OR AT HIS COURT.

QUESTION FOUR

WHETHER THE APPEARANCES OF WITNESSES IN THE VICINITY OF THE COURT APPROXIMATELY ONE HOUR BEFORE THE HEARING WOULD CONSTITUTE A VIOLATION OF DUE PROCESS EVEN THOUGH SUCH WITNESSES DID NOT CONSULT WITH THE TRIAL JUDGE.

QUESTION FIVE

WHETHER THE QUESTIONING OF THE PETITIONER BY THE TRIAL COURT CONSTITUTED A VIOLATION OF DUE PROCESS OF LAW.

QUESTION SIX

WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE DENIED BY FILING THE CASE AT LAW IN A COURT WHOSE CRIMINAL JURISDICTION WAS LIMITED TO CAPITAL CASES.

ARGUMENT

QUESTION ONE

WHETHER A STATE VIOLATES DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE UNITED STATES CONSTITUTION BY FAILURE TO AFFORD A JURY TRIAL TO THOSE ACCUSED OF CONTEMPT OF COURT.

In court proceedings in matters of contempt the determination of fact and inferences therefrom is for the trial judge. See *Baumgartner vs. Joughin*, 105 Fla. 335, 141 So. 185. As recently as the case of *Dodd vs. State*, Fla. App., 110 So.2d 22, Florida reiterated the state rule applicable to all citizens of this state that a conviction of indirect criminal contempt will be sustained even though such conviction was entered without benefit of a jury.

The commandments of the sixth and seventh amendments, which require a jury trial in *criminal and certain civil* cases in the federal courts are not picked up by the due process clause of the fourteenth amendment so as to become limitations upon the states. *Fay vs. New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043.

In light of the above authority it is clear that petitioner's position that he was denied his federal constitutional right by the failure of the state to provide him with the services of a jury must fall. It is further clear that since, under the law of this state, no citizen is entitled to a jury trial on charges of contempt, petitioner was not subjected to any discriminatory practice.

As is demonstrated by the case of *United States vs. United Mine Workers of America*, 330 U.S. 258, 298, 91 L.Ed 884, 915, the federal government has recognized that contempts may be tried without a jury even where such contempt occurred outside the direct judicial view of the court. Such case involved a violation of a labor strike injunction which occurred at the place of employment, well outside the courtroom. The United States Supreme Court stated "The defendants, we think, were properly tried by the court without a jury." It is therefore quite clear that contempt proceedings and contemners are in a classification reasonably distinctive from those proceedings wherein juries may be appropriate. Insomuch as trial by jury is the rule in most federal cases, it is clear that the United States Supreme Court has recognized contempt proceedings as distinguishable from those proceedings wherein jury trials are provided. The purpose of contempt proceedings is to uphold judicial dignity, and such purpose is best served by the judiciary.

The petitioner has not been denied equal protection of the law inasmuch as none of the citizens of this state who fall within this distinctive class are permitted jury trials as a matter of right.

QUESTION TWO

WHETHER THE ACTION OF THE PETITIONER CONSTITUTED THE CRIME OF CONTEMPT.

Petitioner, in his question two of the petition for writ of certiorari, which is corollary to the instant question, urges that the First District Court of Appeal of Florida, as well as the Florida Supreme Court, found that he had no intent to commit contempt of court. Such allegation is contrary to the facts. Reference to the case of *Roy J. Neering*, petitioner, vs. *State of Florida*, respondent; *State of Florida*, cross-petitioner, vs. *Roy J. Neering*, cross-respondent; *State of Florida*, petitioner, vs. *Roy J. Neering*, respondent, reported at 155 So.2d 874, reveals that the majority opinion made no finding whatsoever regarding the intent of the petitioner. The minority dissenting opinion certainly can not be relied upon to establish the facts of the case, as such opinion is adverse to the holding in the case.

It is likewise clear that the opinion of the First District Court, as revised, makes no finding in regard to the intent of the petitioner. Such court initially found that petitioner had demonstrated no malicious intent, but upon reconsideration, struck such finding, presumably because it was not accurate, and the opinion in its final form fails to hold that petitioner lacked that intent necessary to justify conviction for contempt. See *Neering vs. State*, 141 So.2d 615. The information upon which petitioner was charged and the judgment and sentence of the trial court specifically state that the petitioner attempted to influence the decisions of a juror. *Thus there is a clear finding of intent.*

In the case of *Baumgartner vs. Joughin*, 105 Fla. 335, 141 So. 185, the Florida court laid down the reasonable rule that if the actions with which petitioner was charged must, under any reasonable construction, result in an obstruction to the administration of justice, then the intent to do such act is sufficient to sustain a conviction for contempt.

As is shown by the statement of the facts, the petitioner made clear to a particular juror that his own friends were those who represented the plaintiff in a particular case. The juror could have no possible doubt as to where the petitioner's sympathies lay. The conversation, reduced to its basic form, illustrates that a friend of a given juror called such juror, asked for a special favor, and though he never specifically named such favor, he demonstrated his own sympathies and interests by the further mentioning of pain and suffering so that the juror would have reason to support that cause with which the caller sympathized.

In the case of *Sloan vs. Brown*, 114 Fla. 739, 154 So. 514, wherein the contempt consisted of asking a juror to look after the interest of the contemner, the Supreme Court indicated that if the overt acts of the alleged contempt were proved, the offender may be presumed to be guilty of contempt, where such acts would result in an interference with the orderly administration of justice.

It was the intent of the instant petitioner to make a conversation and communication which would reasonably influence the juror. Such intent is sufficient to sustain the conviction. Of course, if the petitioner had not known that the listener was a member of the jury venire, then he would have lacked that criminal intent necessary to uphold the judgment of the lower court, but the fact that he had the intent to make a communication to a juror which would reasonably interfere with the unbiased administration of justice by such juror is sufficient to sustain the conviction rendered.

Petitioner may not have had a malicious motive as distinguished from intent; however, it is clear that regardless of absence of malicious motive, or even the absence of motive, petitioner may nevertheless be guilty as charged.

It is therefore submitted that even if the question of intent is not considered under the restrictive limits of constitutional

issues such question must be resolved against the petitioner. It is a fortiari that such question must be resolved against petitioner if considered only within the narrow limits of federal constitutional issues.

QUESTION THREE

WHETHER A JUDGE IS DISQUALIFIED FROM PRESIDING OVER CONTEMPT PROCEEDINGS WHICH WERE DIRECTED AT HIMSELF OR AT HIS COURT.

This question is in opposition to question three presented on page three of the petition for writ of certiorari. Such question is as follows:

> "Whether a State can simultaneously and in one action prosecute a defendant accused of indirect criminal contempt of court under both a Direct Information filed by the State Attorney and an Order for Rule to Show Cause entered by the Trial Judge, who additionally functions as trier of the facts, without this constituting a departure from due process and equal protection."

Since it is apparent that the addition of a direct information to the order for rule to show cause only serves to more clearly inform the petitioner of the charges against him, and could, in no way have acted to petitioner's prejudice, the question as stated in the petition for writ of certiorari reduces down to the sole issue as to whether the trial judge's act of presiding over the case of contempt directed at his court, wherein he had issued the order to show cause, violated the defendant's right to due process. The basis for disqualification is that the trial judge can not act impartially in the case. The United States Supreme Court wisely approved the action of a trial judge who held in contempt certain attorneys who had engaged in that which amounted to a conspiracy against such judge in the case of *Sacher vs. United States*, 343 U.S. 1, 96 L.Ed. 717, 72 S.Ct. 451. It is clear that in the instant case where there was no misconduct directed at the presiding judge, there was less reason to interpose a presumption of prejudice than was present in the *Sacher* case, supra. It thus

must follow that the judge was not disqualified from presiding over those contempt proceedings which involved a contempt directed at his court.

QUESTION FOUR

WHETHER THE APPEARANCE OF WITNESSES IN THE VICINITY OF THE COURT APPROXIMATELY ONE HOUR BEFORE THE HEARING WOULD CONSTITUTE A VIOLATION OF DUE PROCESS EVEN THOUGH SUCH WITNESSES DID NOT CONSULT WITH THE TRIAL JUDGE.

The fact that certain state witnesses were subpoenaed by the state attorney to appear at the judge's chambers at a time prior to the time designated in petitioner's subpoena initially caused this office some concern; however, an investigation revealed that the witnesses were called early by the state attorney so that he could fully interview them before trial, and that such procedure is usual throughout the state. The petitioner was not called at such time because his basic rights against self-incrimination precluded a pre-trial interview. The witnesses were not called for the purpose of giving pretrial testimony before the judge, but were only subpoenaed to the vicinity of the judge's chambers for the purpose of being questioned by the state attorney outside of such chambers. Such location was chosen so that after the interviews were completed, the witnesses would be on hand to appear in the judge's chambers for the purpose of giving trial testimony.

The petition for writ of certiorari, in effect—and with some candor—acknowledges that no wrongdoing is ascribed to the procedure followed but nevertheless urges that just the fact that the state witnesses were subpoenaed at an early time should be held to violate petitioner's federal constitutional rights to due process of law. Such position is so unique that the state has abandoned its search for a case wherein a ruling was made on such issue. It is patent that the petitioner, who

) as the burden of carrying the issue, has failed in his petition for writ of certiorari to sustain or support the question by any citation of authority.

The concern of this office for the petitioner's basic constitutional rights as well as its desire to insure that the concepts of basic "fair play" were not violated during the trial proceedings resulted in an affidavit from the assistant state attorney which set out the reasons for the early time designated by the subpoenas and the reason why the chambers of the judge were designated as the place for the witnesses to appear rather than the courtroom. (See appendix A to this brief). The state was not permitted to file such affidavit as a part of the record in the First District Court of Appeal evidently because it went to the question of presentation of ex parte testimony, and such possibility was not made an issue by the petitioner.

Petitioner is in the position of asking this court to presume prejudicial error from an occurrence which amounts to standard practice in the state of Florida. This court has previously held that prejudicial error will not be presumed. The wisdom of such holding is supported by the circumstance of the instant case where, in fact, there was no prejudicial error, and where lack of the presumption of prejudicial error would lead to a conclusion adverse to the true facts. The occurrence of erroneous appellate holdings can only be prevented by requiring petitioner to demonstrate the occurrence of that wrong which he has chosen to indirectly intimate by citing a circumstance, while at the same time, acknowledging that such wrong should not be ascribed to such circumstance, to wit: the petitioner is in the position of urging that this court assume that his basic right to a proper hearing was in some way denied by unknown wrongs which occurred between the time the witnesses were subpoenaed and the time the trial took place, even though he indicates that no wrong should be ascribed to the circumstance of the early calling of the witnesses.

QUESTION FIVE

WHETHER THE QUESTIONING OF THE PETITIONER BY THE TRIAL COURT CONSTITUTED A VIOLATION OF DUE PROCESS OF LAW.

As is demonstrated by the case of *United States vs. DeFillo*, 257 F.2d 835, 839, if questions elicited from a witness are for recognized purposes which are proper either on direct or cross-examination, prejudice does not arise merely because the questions are asked by the court. The *DeFillo* rule has been recognized extensively as is shown by the case of *People vs. Giacomino*, 347 Ill. 523, 180 N.E. 437, 84 A.L.R. 1168, and those annotations beginning at 84 A.L.R. 1172. The basis for any limitation upon the right of the trial court to question witnesses is the possibility that such questioning when directed from the bench rather than counsel may bias the jury against a particular party. In the instant case, where there was no jury to be adversely affected, it would appear that a wide scope should be granted to the general right of the trial judge to question witnesses. Since the judge was acting as a jury or factfinder, his conduct was similar to that of a juror questioning a witnesses. As is shown by *State vs. Anderson*, 155 P.2d 127, 159 A.L.R. 340, a court may, within its discretion, properly permit a juror to question a witness. The annotations which follow such case at 159 A.L.R. 347 provide extensive authority for the proposition that there is no error in permitting jurors to question witnesses where the questions asked would be proper if submitted by counsel.

The petitioner has lifted from the questions asked by the court only two questions as an example of the overall questioning. There follows in order each and every question asked by the court and the answer of the witness to such question is omitted as immaterial:

"Q Mr. Neering, the attorney to whom you refer as Mr. Shown, Mr. Gerald S-o-h-n, is he not?

A —

Q And he is either a partner or an associate of the law firm of Searcy & Sulik?

A —

Q Well, he is connected as either a partner or an associate with that firm, is that correct?

A —

Q What is the name on the door?

A —

Q And another one is H. M. Searcy?

A —

Q And Mr. Sohn or Sohn, however it's pronounced, represented you in some legal matter?

A —

Q What is the basis of your acquaintance with Mr. Searcy?

A —

Q What was it that Mr. Searcy said to you about this case when he called you into his office?

A —

Q Did Mr. Searcy ask you to contact Mr. Benoit?

A —

Q What was the purpose of your contacting Mr. Benoit?

A —

Q You had no motive?

A —

Q Did you think he would be a fair juror before you called him?

A —

Q Would his answer to your question have made any difference in your opinion as to whether he would be a fair juror?

A —

Q Why did you care whether he would be a fair juror, Mr. Neering?

A —

Q You have served as a juror?

A —

Q Mr. Neering, are you not aware that it's wrong for you to contact a member of the jury panel or venire?

A —

Q What purpose did you have, what effect did you think it would have on Mr. Benoit, your calling him about this particular case?

A —

Q What was your intention?

A —

Q What did you hope to accomplish by your call to Mr. Benoit?

A —

Q You were trying to influence the way he would vote in the case of Brendel against Winn-Dixie?

A —

Q Anything further?

A —"

(See pages 85-91, transcript of testimony and proceedings in the circuit court).

As can be seen from the above, the participation of the trial court was small when measured against the one hundred and fifteen pages of transcript of testimony.

It is submitted that insomuch as there was no jury to be prejudiced by the questions asked and such questions being of a proper nature, the fact that such questions were asked by a judge rather than an attorney should not provide the petitioner with grounds for reversal even if tested by rules of error and not by the more stringent rule of whether such practice violated due process of law so as to give rise to a federal question.

QUESTION SIX

WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE DENIED BY FILING THE CASE AT LAW IN A COURT WHOSE CRIMINAL JURISDICTION WAS LIMITED TO CAPITAL CASES.

There is considerable authority for the view that civil and criminal contempt can be tried in the same proceeding. 91 L.Ed. 962. It is apparent that such proceeding could not be

labeled a criminal proceeding nor accurately labeled a civil proceeding. Neither could such proceeding accurately be labeled in equity or at law. Contempt proceedings are, by nature, a species in themselves and are not entirely comparable to any other. The Circuit Court in and for Duval County, Florida, would not have jurisdiction over the contempt proceeding if it was treated as strictly a criminal case. Such court only has jurisdiction over capital offenses. The court labeled the proceedings for the purposes of filing as "at law" because only indictments are utilized in such circuit court for criminal proceedings. Such label was strictly for the filing system of the clerk and was not for the benefit of appellant. Certainly any appellant who possessed the knowledge of law necessary to understand the "L" placed after the number of the case and thus be misled by such letter would certainly realize that the case contemplated a criminal proceeding when it was initiated by an information filed by the state attorney. The facts alleged by such information, if true, could only constitute criminal contempt.

The information was entitled in the matter of contempt proceedings against Roy J. Neering (Appendix J, 28a-petition). This is a criminal styling. 17 C.J.S. Contempt Sect. 69. If the proceeding had been for civil contempt, it would have been between the original parties of a suit and would have been instituted and tried as a part of the original cause and not as a separate proceeding. *Seaboard Air Line Ry. Co. vs. Tampa Southern Ry. Co.* (1931), 101 Fla. 468, 134 So. 529. Certainly a clerical error made by the clerk of the court which involved only the filing system numbers on the pleading should not be allowed to invalidate judicial proceedings where the party was on notice as to the characteristic of such proceedings through the fact that the state attorney was handling the proceedings; that the proceedings were initiated by an information; that the facts alleged by such information could only be a basis of a criminal contempt and that the title of such information indicated that the information was a separate

action from any civil action and was, therefore, by nature, a criminal contempt.

In the case of *United States vs. United Mine Workers of America*, 330 U.S. 258, 91 L.Ed. 884, the court was faced with the question of whether the ommission of the words "criminal contempt" in a rule to show cause was prejudicial error. The court concluded that such ommission did not substantially prejudice the defendants when they were fully informed by other circumstances that criminal contempt was charged. It is apparent that the general styling of the proceedings, as well as the fact that the state attorney and state were the parties in opposition to the petitioners, as distinguished from civil parties, clearly indicated to the petitioner's counsel, who carried the responsibility of defense, that such defense was concerned with a charge of criminal contempt.

CONCLUSION

Wherefore, it is concluded that not only was there no violation of the due process provisions of the fourteenth amendment, but that in fact the issues raised by the petition for writ of certiorari did not lie within the broad scope of reversible error.

WHEREFORE, this court is respectfully requested to deny the petition for writ of certiorari.

Respectfully submitted,

JAMES W. KYNES
Attorney General

JAMES G. MAHORNER
Assistant Attorney General

Counsel for Respondent

PROOF OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Response to Petition for Writ of Certiorari to the Supreme Court of the State of Florida has been forwarded by mail to the Honorable Luke G. Galant, 311 First Bank & Trust Building, Jacksonville 2, Florida, Attorney for Petitioner, this _____ day of February, 1964.

_____

Of Counsel for Respondent.